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In the Supreme Court of the United States

OCTOBER TERM, 1972

NO.

SEABOARD COAST LINE RAILROAD COMPANY,
a Virginia corporation,

Petitioner,

vs.

WILLIAM P. JACKSON,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL, FIRST DISTRICT, STATE OF FLORIDA

Petitioner, Seaboard Coast Line Railroad Company, respectfully prays that a Writ of Certiorari issue to review the final judgment of the District Court of Appeal, First District, State of Florida.[1]

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[1]The Florida District Court of Appeal was the final Court of Appeal, of right, in the instant case, as the Florida Supreme Court only maintains discretionary review by certiorari (Fla.App. R. 2.1(b)).

OPINIONS AND ORDERS BELOW

On June 19, 1970, the Circuit Court for Duval County, Florida, entered final judgment for William P. Jackson in the sum of $325,000.00, said final judgment being rendered on July 20, 1970, after denial of motion for new trial (App. 1). No formal opinion was rendered by the Circuit Court. However, in the order denying the post-trial motions, the trial court expressed the opinion that the verdict was based upon the Boiler Inspection Act count of the amended complaint[2] (App. 2). The opinion constituting the final judgment of the First District Court of Appeal, State of Florida, is reported at 256 So.2d 568 (App. 4). Rehearing before the First District was denied on February 7, 1972 (App. 10). The Florida Supreme Court denied certiorari (App. 11), and denied rehearing for certiorari (App. 12). Both Florida Supreme Court orders have not been reported at the time of filing of this petition.

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[2]The Court is of the opinion that the Verdict is based solely on the Boiler Inspection Act Count of the Amended Complaint (Count II); that there is evidence to support the Verdict as to that Count, and that there was no error at the trial which requires the setting aside of the Verdict and the granting of a new trial as to said Count II.

However, the Court is of the opinion that as to Count I, the Verdict is against the manifest weight of the evidence, and "is so grossly excessive as to shock the judicial conscience", because the negligent acts of the plaintiff were the primary legal causes of his injuries, and that plaintiff's negligence was so great that the Verdict should not be allowed to stand. Except for the fact that it would accomplish nothing, the "Motion for New Trial" would be granted on grounds 2, 3, and 4 thereof, or a Remittitur of $225,000.00 ordered on grounds 5, 6, 10, 11 and 12 of the Motion for Remittitur.

JURISDICTION

The date of the judgment of the Florida First District Court of Appeal opinion sought to be reversed is December 23, 1971 (App. 4). Rehearing was denied on Febraury 7, 1972 (App. 10). The Florida Supreme Court denied certiorari on April 25, 1972 (App. 11), and denied rehearing for certiorari on May 31, 1972 (App. 12).

This Court's jurisdiction is invoked pursuant to Title 28, United States Code, Section 1257(3).

QUESTIONS PRESENTED

I.

WHETHER A RADIO ATTACHED TO AN ENGINE IS A PART OR APPURTENANCE WITHIN THE BOILER INSPECTION ACT, TITLE 45, UNITED STATES CODE, SECTION 23.

II.

WHETHER A DEFECTIVE RADIO PROXIMATELY CAUSED PLAINTIFF TO INCUR INJURY AFTER THE PLAINTIFF INITIATED THE TRAIN MOVEMENT AND THREW THE WRONG SWITCH.

STATUTORY PROVISION INVOLVED

United States Code, Title 45:

> Section 23. "Use of unsafe locomotives and appurtenances unlawful; inspection and tests.
>
> "It shall be unlawful for any carrier to use or permit to be used on its line any locomotive unless said locomotive, its boiler, tender, and all parts and appurtenances thereof are in proper condition and safe to operate in the service to which the same are put, that the same may be employed in the active service of such carrier without unnecessary peril to life or limb, and unless said locomotive, its boiler, tender, and all parts and appurtenances thereof have been inspected from time to time in accordance with the provisions of sections 28-30 and 32 of this title and are able to withstand such test or tests as may be prescribed in the rules and regulations hereinafter provided for. Feb. 17, 1911, c.103, §2, 36 Stat. 913; Mar. 4, 1915, c.169, §1, 38 Stat. 1192; June 7, 1924, c.355, §2, 43 Stat. 659."

STATEMENT OF THE CASE

This cause was tried by a jury based upon an amended two-count complaint seeking relief under the Federal Employers' Liability Act (45 U.S.C. §51-60) and the Boiler Inspection Act (45 U.S.C. §22-34). The First District Court of Appeal concisely stated the facts material to the questions presented when it stated:

"... plaintiff Jackson was working as a switchman in the Baldwin yards of defendant Railroad. His employment encompassed the throwing of switches in channeling railroad cars to a specific sidetrack. In order to direct the engineer and others in the work crew, Jackson gave signals either by hand, lantern or radio. At about 8:00 p.m. on the night of the accident the switching crew composed of Jackson, the conductor, field switchman and the engineer was moving a cut of cars in the Baldwin yard from the main lead track onto the No. 19 track. To accomplish the move it was necessary for Jackson to throw the No. 3 switch and then throw the No. 19 switch. Signals given to effectuate the movement were transmitted by Jackson's portable radio. Jackson erroneously threw a switch which put the cut of cars on the wrong track. After erroneously throwing the switch, Jackson called to the engineer on his radio advising him to move the train by saying, 'Come ahead.' The field switchman testified that he heard Jackson's transmission on his portable radio and he was fearful that the engineer did not receive Jackson's signal. For this reason he relayed the signal to the engineer on his radio. The movement was initiated and Jackson was struck by the cut of cars severing both his legs." (256 So.2d 568, 9)

The railroad, at the close of plaintiff's case, moved for a directed verdict, contending in part that a radio is not a part or appurtenance under the Boiler Inspection Act. It was further contended the alleged defective radio was not a proximate cause of the injury, as the plaintiff

initiated the train movement and threw the wrong switch (Trial Transcript 810-817). At the close of all the evidence the motion was renewed and again denied (Trial Transcript 888-889). The defendant next moved for judgment notwithstanding the verdict, alleging in part the grounds delineated above (App. 12). On appeal to the First District Court of Appeal the same grounds were alleged, and the Court responded:

> "The Railroad contends that at the conclusion of plaintiff's case its motion for directed verdict should have been granted because: (1) an engine radio is not an appurtenance under the Boiler Inspection Act; (2) plaintiff failed to establish any evidence of a defective condition in the engine radio; and (3) assuming the failure of the engine radio, it was not the proximate cause of the plaintiff's injuries.
>
> "The Boiler Inspection Act provides in part:
>
> 'It shall be unlawful for any carrier to use or permit to be used on its line any locomotive unless said locomotive, its boiler, tender, and all parts and *appurtenances* thereof are in proper condition and safe to operate' . . . " (emphasis supplied)
>
> "Although the Railroad concedes that a radio was installed on the locomotive, it strenuously argues same was not an appurtenance within the meaning of the Boiler Inspection Act. The Railroad cites Southern Railway Co. v. Lunsford as the leading case on this point. There, the Supreme Court was confronted with an experimental device called 'Wright's Little Watchman,' and in holding same was not an appurtenance stated:

" 'With reason, it cannot be said that Congress intended that every gadget placed upon a locomotive by a carrier, for experimental purposes, should become part thereof within the rule of absolute liability. So to hold would hinder commendable efforts to better conditions and tend to defeat the evident purpose—avoidance of unnecessary peril to life or limb. Whatever in fact is an integral or essential part of a completed locomotive, and all parts or attachments definitely prescribed by lawful order of the Interstate Commerce Commission, are within the statute. But mere experimental devices which do not increase the peril, but may prove helpful in an emergency, are not.'

"The Railroad then reasons that the engine radio was not essential to the operation of a yard locomotive since movement of railroad cars had been conducted earlier on the evening of the accident by means of hand signals. Further, since there was no evidence that the Interstate Commerce Commission had promulgated any rules governing the use of a radio on a locomotive, the Boiler Inspection Act does not apply to this device.

"In the case of Southern Railway Company v. Bryan the Fifth Circuit Court of Appeals in construing the Boiler Inspection Act stated:
" ' . . . All of the federal safety laws in Chapter 1, Title 45, U.S.C., are in pari materia and must be liberally construed in connection with the federal remedy provided in Chapter 2 of such title to carry out their remedial and humanitarian purposes.'

"And in Fritts v. Toledo Terminal R. Co., the federal Supreme Court held that the seat upon which the engineer sat while operating a locomotive was a 'part and appurtenance' of the engine, the defective condition of which would impose absolute responsibility upon the railroad.

"[1] This record reveals that such radios have been utilized by the railroad industry for a numof years to facilitate the movement of cars in switching and yard operations. We hold that the engine radio here considered was clearly a 'part and appurtenance' as within the meaning of the Boiler Inspection Act.

"[2] We next consider appellant's assertion that the plaintiff failed to establish any evidence of a defective condition in the engine radio. Competent testimony was adduced and presented to the jury by plaintiff as to the defective condition of the engine radio. The trial judge was correct in denying the Railroad's motion for a directed verdict and properly submitted the conflicting evidence to the jury. As to the Railroad's contention that the failure of the radio was not the proximate cause of Jackson's injury, we observe that the evidence is undisputed that had Jackson's transmission been received by the engineer, Jackson would not have left his place of safety."

REASONS FOR GRANTING THE WRIT

I.

THE QUESTIONS PRESENTED HERE ARE IMPORTANT QUESTIONS OF FEDERAL LAW WHICH HAVE NOT BEEN BUT SHOULD BE SETTLED BY THIS COURT.

A. THE FEDERAL QUESTIONS INVOLVED ARE OF GREAT CONCERN TO A NATIONWIDE INDUSTRY THAT IS ECONOMICALLY BEING HARMED IN PART BECAUSE OF CONFLICTING JURISDICTIONS.

This Court has never clearly indicated what a "part or appurtenance" of a locomotive is. In 1936 in *Southern Railway Co. v. Lunsford*, 297 U.S. 398, 56 S.Ct. 504, 80 L.Ed. 740, this Court did say:

> "With reason, it cannot be said that Congress intended that every gadget placed upon a locomotive by a carrier, for experimental purposes, should become part thereof within the rule of absolute liability. So to hold would hinder commendable efforts to better conditions and tend to defeat the evident purpose—avoidance of unnecessary peril to life or limb. Whatever in fact is an integral or essential part of a completed locomotive, and all parts or attachments definitely prescribed by lawful order of the Interstate Commerce Commis-

> sion, are within the statute. But mere experimental devices which do not increase the peril, but may prove helpful in an emergency, are not. These have not been excluded from the usual rules relative to liability."

It should be noted that no evidence was introduced indicating the Interstate Commerce Commission (now the Department of Transportation — Pub.L.89-67) has promulgated any rules governing the use of a radio on a locomotive.

The Ohio Supreme Court, in a case similar to the instant one, stated:

> "It may be noted that the Federal Safety Appliance Act *does not* provide for a properly functioning radiotelephone and the only basis for recovery relied upon by plaintiff in the instant case is the alleged defective hand brake." (*Reed v. Pa. Rd. Co.*, 171 Ohio St. 433, 171 N.E.2d 718, cert den., 366 U.S. 936, 81 S.Ct. 1661, 6 L.Ed.2d 847) (emphasis supplied)

The highest Florida Appellate Court in the instant case disagrees with the Supreme Court of Ohio.

Petitioner prays this Court review and clearly delineate the meaning of the words "part or appurtenance thereto." Surely, in 1911 when the Boiler Inspection Act was passed, Congress was not thinking a radio was part of an engine!

It was conceded the basic intent on the Boiler Inspection Act was safety. The petitioner agrees that safety in operating engines is necessary and would agree that, under the Act, all parts of an engine actually used to make it function *mechanically* should be included. Petitioner strenuously states that a "malfunctioning" radio should not be considered a part or an accessory of an engine, thereby creating absolute liability because of the alleged malfunction. Should all optional equipment not required for the safe operation of an engine be considered a part thereof, e.g., a refrigerator for the engineer's lunch?

In the instant case the employee was not harmed electrically because of the radio, nor was he injured in any way because of its physical presence in the engine. The employee was injured because he threw the wrong switch and then called for the train to move. Even if it be argued that the engineer did not hear the plaintiff's radio signal and then moved on a radio signal given by a fellow employee who did hear it, the train movement proceeded just as the plaintiff-employee wanted it to proceed.

Would one consider a radio necessary for the safe operation of a taxi? Certainly, if the taxi's radio ceased functioning and the taxi was in an intersectional accident because it ran a red light, would one find fault with the radio? We respectfully submit that the Court should consider what is necessary for the safe operation of an engine, but certainly not include every possible addition thereto. The petitioner prays that this Court will interpret the words "and all parts and appurtenances thereof" to mean those parts and appurtenances directly necessary to the actual mechanical operation of the engine.

B. THIS CASE IS IDEALLY SUITED TO DETERMINE IF BOILER INSPECTION ACT JURY VERDICTS CAN EVER BE JUDICIALLY SUPERVISED.

Although there is absolute liability under the Boiler Inspection Act and Safety Appliance Act, the plaintiff must still prove that the defective radio was a *proximate cause* of the plaintiff's injuries. This Court stated:

> "The rule clearly deducible from these four cases is that, on the one hand, an employee cannot recover under the Safety Appliance Act if the failure to comply with its requirements is not a proximate cause of the accident which results in his injury, but merely creates an *incidental condition or situation* in which the accident, otherwise caused, results in such injury; and, on the other hand, he can recover if the failure to comply with the requirements of the act is a proximate cause of the accident, resulting in injury to him while in the discharge of his duty, although not engaged in an operation in which the safety appliances are specifically designed to furnish him protection." (*Davis v. Wolfe*, 263 U.S. 239 at 243, 44 S.Ct. 64, 68 L.Ed. 284.) (emphasis supplied)

This Court later stated, in *Rogers v. Missouri P.R. Co.*, 352 U.S. 500, 77 S.Ct. 443, 1 L.Ed.2d 493, a Federal Employers' Liability Act case (comparative negligence), not a Boiler Inspection Act Case (absolute liability), as follows:

> "Under this statute the test of a jury case is simply whether the proofs justify with reason the conclusion that *employer negligence played any part, even the slightest*, in producing the injury or death for which damages are sought. It does not matter that, from the evidence, the jury may also with reason, on grounds of probability, attribute the result to other causes, including the employee's contributory negligence. Judicial appraisal of the proofs to determine whether a jury question is presented is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that negligence of the employer played any part at all in the injury or death." (emphasis supplied)

The test of a jury case and proximate cause test contained therein, established in *Rogers* (F.E.L.A. negligence) should not apply to an absolute liability statute, i.e., Boiler Inspection Act. It is wrong to say, "that employer negligence, even the slightest," creates absolute liability when *Davis* indicates the failure (whether negligent or not) to comply with the Boiler Inspection Act may be "an incidental condition or situation" and *not* the *proximate cause* of the injury. Judicial supervision of jury verdicts under *Rogers* is non-existent. This situation should not be allowed to inundate absolute liability statutes.

In the instant case the plaintiff admitted throwing the wrong switch. The plaintiff then initiated the train movement. What difference did it make if his call to the engineer started the train or that his call was relayed to the engineer and the train started? *The radio on the*

engine, whether partially operative or not, did its job, i.e., the train began to move. At this point the radio's function, whether operative or not, stops. It seems ludicrous when a man can admit (a) "I threw the wrong switch," (b) "I started the train," (c) "I was injured, yet the railroad is at fault because my instruction to move the train was relayed to the engineer instead of being directly received."

Assuming the plaintiff himself moved after giving his radio signal, it is petitioner's contention that once the signal was received by the engineer, whether or not there even was a radio on the engine had nothing to do with proximately causing plaintiff's injuries. If a man calls a taxi and is standing in the street and is struck by the taxi when it arrives, what difference does it make if he used a radio to call the taxi or a hand signal? The man requested it; it came; and his sole negligence caused the injury.

The plaintiff contends the railroad can only be absolved if the railroad was acting in a vacuum, as even the slightest incidental condition creates absolute liability. The petitioner prays that this Court define proximate cause as used within the Boiler Inspection Act.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

DATED: August ____, 1972.

Respectfully submitted,

KENNETH L. RYSKAMP
Counsel of Record

SAMUEL S. FORMAN
Counsel
401 City National Bank Building
25 West Flagler Street
Miami, Florida 33130
For Petitioner

APPENDIX

APPENDIX

IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR DUVAL COUNTY, FLORIDA

NO. 69-8108 Div. C.

[STYLE OMITTED]

VERDICT

We, the jury, find for the Plaintiff William P. Jackson, and against the Defendant, Seaboard Coast Line Rail-Road Company, a Virginia corporation, and assess his damages in the amount of $325,000.00.

So say we all.

June 19, 1970

Date

/s/ Forrest M. Howell

Foreman

IN THE CIRCUIT COURT IN AND FOR DUVAL COUNTY, FOURTH JUDICIAL CIRCUIT OF FLORIDA. DIVISION "C".

CIVIL ACTION NO. 69-8108

[STYLE OMITTED]

ORDER DENYING MOTION FOR NEW TRIAL, ETC.

This cause came on for hearing on the Motions hereinafter disposed of and was argued by counsel for the respective parties.

The Court is of the opinion that the Verdict is based solely on the Boiler Inspection Act Count of the Amended Complaint (Count II); that there is evidence to support the Verdict as to that Count, and that there was no error at the trial which requires the setting aside of the Verdict and the granting of a new trial as to said Count II.

However, the Court is of the opinion that as to Count I, the Verdict is against the manifest weight of the evidence, and "is so grossly excessive as to shock the judicial conscience", because the negligent acts of the plaintiff were the primary legal causes of his injuries, and that plaintiff's negligence was so great that the Verdict should not be allowed to stand. Except for the fact that it would accomplish nothing, the "Motion for New Trial" would be granted on grounds 2, 3, and 4 thereof, or a Remittitur

of $225,000.00 ordered on grounds 5, 6, 10, 11 and 12 of the Motion for Remittitur.

Upon consideration, it is

ORDERED AND ADJUDGED:

1. The Motion for Judgment is denied.

2. The Motion for New Trial is denied.

3. The Motion for Remittitur is denied.

DONE and ORDERED in Chambers at Jacksonville, Florida, this 20th day of July, A.D. 1970.

(s) JOHN M. McNATT

Circuit Judge

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA
JULY TERM, A. D. 1971

CASE NO. 0-36

[STYLE OMITTED]

Opinion filed December 23, 1971.

An Appeal from the Circuit Court for Duval County. John M. McNatt, Judge.

Bolles, Goodwin, Ryskamp & Ware, for Appellant.

James H. Nance; Beckham & McAliley; and Horton & Schwartz, for Appellee.

RAWLS, Acting Chief Judge.

Appellee-plaintiff Jackson sued the Railroad seeking damages under the Federal Employers Liability Act.[1] Count I of Jackson's amended complaint alleged that the Railroad had been negligent in several enumerated particulars. Count II claimed a violation of the Boiler Inspection Act[2] which imposes absolute liability upon a railroad to an injured employee when it fails to keep " . . . any locomotive . . . and all parts and appurtenances thereof . . . in proper condition and safe to operate in the service to which the

[1]FELA, 45 U.S.C.A. § 51 et seq.

[2]Boiler Inspection Act, 45 U.S.C.A. § 22.

same are put, that the same may be employed in the active service of such carrier without unnecessary peril to life or limb . . . " Trial was had and an adverse final judgment to the Railroad was entered, pursuant to a jury verdict, in the sum of $325,000.00. Hence, this appeal.

The crux of the Railroad's primary point on appeal is whether a radio installed in a locomotive by the Railroad for the purpose of providing two-way communication between the engine and yard employees is an appurtenance within the meaning of the Boiler Inspection Act.

On the occasion of this tragic accident, plaintiff Jackson was working as a switchman in the Baldwin yards of defendant Railroad. His employment encompassed the throwing of switches in channeling railroad cars to a specific sidetrack. In order to direct the engineer and others in the work crew, Jackson gave signals either by hand, lantern or radio. At about 8:00 p.m. on the night of the accident the switching crew composed of Jackson, the conductor, field switchman and the engineer was moving a cut of cars in the Baldwin yard from the main lead track onto the No. 19 track. To accomplish the move it was necessary for Jackson to throw the No. 3 switch and then throw the No. 19 switch. Signals given to effectuate the movement were transmitted by Jackson's portable radio. Jackson erroneously threw a switch which put the cut of cars on the wrong track. After erroneously throwing the switch, Jackson called to the engineer on his radio advising him to move the train by saying, "Come ahead." The field switchman testified that he heard Jackson's transmission on his portable radio and he was fearful that the engineer did not receive Jackson's signal. For this rea-

son he relayed the signal to the engineer on his radio. The movement was initiated and Jackson was struck by the cut of cars severing both his legs.

Evidence adduced most favorable to Jackson's position is as follows: Engine radios have been standard railroad equipment for a number of years and have been used by the defendant Railroad since 1955; Jackson's transmission to the engineer to "Come ahead" was not received by the engineer on the engine radio receiver; the engineer violated safety rules in moving the train without being in constant communication on the radio or without a signal from Jackson; Jackson's transmission was not heard by the engineer because of some defect in the sensitivity of the receiver installed on the engine; the Railroad took no steps to increase the sensitivity of the receiver in accordance with the manufacturer's recommendations; and had the engineer received Jackson's transmission, Jackson would not have been injured because the sole reason for leaving his place of safety was to walk across the tracks to give a lantern signal which would be visible to the engineer to start the movement.

The Railroad contends that at the conclusion of plaintiff's case its motion for directed verdict should have been granted because: (1) an engine radio is not an appurtenance under the Boiler Inspection Act; (2) plaintiff failed to establish any evidence of a defective condition in the engine radio; and (3) assuming the failure of the engine radio, it was not the proximate cause of the plaintiff's injuries.

The Boiler Inspection Act[3] provides in part: "It shall

[3]Boiler Inspection Act, 45 U.S.C.A. § 23.

be unlawful for any carrier to use or permit to be used on its line any locomotive unless said locomotive, its boiler, tender, and all parts and *appurtenances* thereof are in proper condition and safe to operate . . . " (Emphasis supplied.)

Although the Railroad concedes that a radio was installed on the locomotive, it strenuously argues same is not an appurtenance within the meaning of the Boiler Inspection Act. The Railroad cites Southern Railway Co. v. Lunsford[4] as the leading case on this point. There, the Supreme Court was confronted with an experimental device called "Wright's Little Watchman", and in holding same was not an appurtenance stated:

> "With reason, it cannot be said that Congress intended that every gadget placed upon a locomotive by a carrier, for experimental purposes, should become part thereof within the rule of absolute liability. So to hold would hinder commendable efforts to better conditions and tend to defeat the evident purpose — avoidance of unnecessary peril to life or limb. Whatever in fact is an integral or essential part of a completed locomotive, and all parts or attachments definitely prescribed by lawful order of the Interstate Commerce Commission, are within the statute. But mere experimental devices which do not increase the peril, but may prove helpful in an emergency, are not."

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[4]Southern Railway Co. v. Lunsford, 297 U.S. 398, 56 S.Ct. 504, 80 L.Ed. 740 (1936).

The Railroad then reasons that the engine radio was not essential to the operation of a yard locomotive since movement of railroad cars had been conducted earlier on the evening of the accident by means of hand signals. Further, since there was no evidence that the Interstate Commerce Commission had promulgated any rules governing the use of a radio on a locomotive, the Boiler Inspection Act does not apply to this device.

In the case of Southern Railway Company v. Bryan[5] the Fifth Circuit Court of Appeals in construing the Boiler Inspection Act stated:

> " . . . All of the federal safety laws in Chapter 1, Title 45, U.S.C., are in pari materia and must be liberally construed in connection with the federal remedy provided in Chapter 2 of such title to carry out their remedial and humanitarian purposes."

And in Fritts v. Toledo Terminal R. Co.[6] the federal Supreme Court held that the seat upon which the engineer sat while operating a locomotive was a "part and appurtenance" of the engine, the defective condition of which would impose absolute responsibility upon the railroad.

This record reveals that such radios have been utilized by the railroad industry for a number of years to facilitate the movement of cars in switching and yard operations. We hold that the engine radio here considered was clearly

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[5]Southern Railway Company v. Bryan, 375 F.2d 155 (5 Cir. 1967).

[6]Fritts v. Toledo Terminal R. Co., 293 F.2d 361 (6 Cir. 1961).

a "part and appurtenance" as within the meaning of the Boiler Inspection Act.

We next consider appellant's assertion that the plaintiff failed to establish any evidence of a defective condition in the engine radio. Competent testimony was adduced and presented to the jury by plaintiff as to the defective condition of the engine radio. The trial judge was correct in denying the Railroad's motion for a directed verdict and properly submitted the conflicting evidence to the jury. As to the Railroad's contention that the failure of the radio was not the proximate cause of Jackson's injury, we observe that the evidence is undisputed that had Jackson's transmission been received by the engineer, Jackson would not have left his place of safety.[7]

Being of the opinion that the Boiler Inspection Act is applicable, it is unnecessary to consider the point asserted by the Railroad going to Count I of plaintiff's complaint under the Federal Employers Liability Act.

The judgment appealed is affirmed.

JOHNSON, J., and McLANE, RALPH M., Associate Judge, CONCUR.

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[7]See Coray v. Southern Pacific Co., 335 U.S. 520, 69 S.Ct. 275, 93 L.Ed. 208, 210 (1949), stating:

> "Liability of a railroad under the Safety Appliance Act for injuries inflicted as a result of the Act's violation follows from the unlawful use of prohibited defective equipment 'not from the position the employee may be in or the work which he may be doing at the moment when he is injured.'"

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA
JANUARY TERM, A.D. 1972

CASE NO. 0-36

[STYLE OMITTED]

ORDER

Petition for rehearing having been considered,
IT IS ORDERED that the petition is hereby denied.

WITNESS the Honorable John S. Rawls, Acting Chief Judge, and Seal of the Court this 7th day of Febraury, A.D. 1972.

/s/ Raymond E. Rhodes

Clerk

IN THE SUPREME COURT OF FLORIDA
JANUARY TERM, A.D. 1972
TUESDAY, APRIL 25, 1972

CASE NO. 42,095

[STYLE OMITTED]

DISTRICT COURT OF APPEAL, FIRST DISTRICT

This cause having heretofore been submitted to the Court on Petition for Writ of Certiorari, jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Florida Appellate Rule 4.5c(6), and it appearing to the Court that it is without jurisdiction, it is ordered that the Petition for Writ of Certiorari be and the same is hereby denied.

ROBERTS, C. J., ERVIN, BOYD, McCAIN and DEKLE, J.J., concur.

IN THE SUPREME COURT OF FLORIDA
JANUARY TERM, A.D. 1972
WEDNESDAY, MAY 31, 1972

Case No. 42,095

[STYLE OMITTED]

On consideration of the Petition for Rehearing filed by attorneys for Petitioner,

IT IS ORDERED by the Court that said Petition be, and the same is hereby, denied.

ROBERTS, C. J., ERVIN, BOYD,
McCAIN and DEKLE, J.J., Concur

APPENDIX 7

IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT OF FLORIDA IN AND FOR DUVAL COUNTY

CIVIL CASE NO. 69-8108 (Div. "C")

[STYLE OMITTED]

MOTION FOR JUDGMENT IN ACCORDANCE WITH DEFENDANT'S MOTIONS FOR DIRECTED VERDICT AND FOR JUDGMENT NOTWITHSTANDING THE VERDICT

COMES NOW the Defendant, by and through its undersigned attorneys, and moves the Court to set aside the verdict of the jury dated June 19, 1970, in the sum of $325,000.00 and the Final Judgment for Plaintiff and against Defendant entered upon said jury verdict, and to have Judgment entered for this Defendant and against the Plaintiff notwithstanding the verdict of the jury and in accordance with the Defendant's Motions for Directed Verdict made at the close of the Plaintiff's case and made at the close of all of the evidence, on each and/or any of the grounds, separately and severally, set forth and urged in support of the Defendant's Motions for Directed Verdict above referred to, and on the following additional grounds:

1. There was no evidence adduced of any violation of the Boiler Inspection Act on the part of this Defendant which would warrant the submission of that issue to the jury.

2. There was no evidence adduced to show that the Boiler Inspection Act applied in this case, nor any evidance showing that the Boiler Inspection Act or the regulations promulgated pursuant thereto made an engine radio a part, appurtenance, or appliance which was covered by the Boiler Inspection Act.

3. There was no evidence adduced of any violation of the Boiler Inspection Act which caused or contributed to cause, in whole or in part, the injuries and damages to the Plaintiff.

(remainder of motion omitted)

DATED: June 25, 1970

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ANNOTATION

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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-321

SEABOARD COAST LINE RAILROAD COMPANY,
Petitioner,

vs.

WILLIAM P. JACKSON,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

PRELIMINARY STATEMENT

The petitioner, Seaboard Coast Line Railroad Company, seeks review by petition for writ of certiorari pursuant to 28 U.S.C., § 1257, of the decision of the First District Court of Appeal of Florida in *Seaboard Coast Line R. Co.* v. *Jackson*, Fla. App. 1971, 256 So. 2d 568, cert. den., Fla. 1972, 262 So. 2d 442.

The decision affirmed a judgment entered by the Duval County, Florida, Circuit Court upon a jury verdict in favor of the respondent Jackson and against his employer, the petitioner Seaboard, in an action under the Fed-

eral Employers Liability Act and the Boiler Inspection Act, 45 U.S.C., § 23. The jury trial concerned an accident sustained by Jackson, who was a switchman employed by the Seaboard, in the evening of January 3, 1969. At about 7:00 that evening, Jackson was knocked down and run over by a cut of refrigerator cars being pushed by an engine in a switching movement in the railroad's Baldwin, Duval County, yards. Both of Jackson's legs were severed in the accident.

The accident occurred after Jackson, who was in charge of the switching movement, having pulled a switch,[1] had radioed with his "Handy Talkie" set to the engine which he could not see, to "come ahead." The radio receiver in the engine did not receive Jackson's message, and the engineer, a man named Saucer, did not respond to the message either by radio or by actually commencing the movement. Jackson therefore thought it was necessary to cross several tracks in order to get into a position where his hand lantern could be seen by the engineer in order to signal the commencement of the movement. Tragically, unknown to Jackson, his message *was* received by another portable radio carried by another member of his crew, Switchman Daniels. Daniels "relayed" the message to Saucer; Saucer received Daniel's message and began to "come ahead" with his engine pushing 28 "reefers" or refrigerator cars ahead. As Jackson was crossing the so-

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1. Jackson in fact pulled the wrong switch. The movement to be made called for him to pull the Track No. 19 switch; for reasons unknown, he mistakenly pulled the "middle lead" or "pocket switch." The pulling of the middle lead switch resulted in the cut going on to the middle lead track upon which Jackson was injured; if the No. 19 switch had been pulled, the cut could not have gone into the middle lead track. On the basis of this fact, the railroad contended below and contends here that Jackson's negligence was the sole cause of the accident. For many reasons, this contention was and is wholly without substance.

called "middle lead" or "pocket" track to give the hand signal he thought was required after his radio message was not picked up in the locomotive, the cut which was being pushed in response to Daniel's signal, but which he had no reason to believe was being moved, knocked him down and ran over his legs.

Jackson sued Seaboard in a two-count complaint. Count I alleged that the Seaboard had been negligent in several enumerated particulars. Count II claimed a violation by the railroad of the Boiler Inspection Act, 45 U.S.C., § 23, which, of course, imposes absolute liability upon a railroad when it fails to keep

> "any locomotive . . . and all parts and appurtenances thereof . . . in proper condition and safe to operate in the service to which the same are put, that the same may be employed in the active service of such carrier without unnecessary peril to life or limb. . ."

The basis of Count II was that the engine radio, a "part and appurtenance" of the locomotive, had not in fact been in proper condition so as to receive Jackson's message, and that this was a cause, in whole or in part, of the resulting accident.

At the jury trial, the record demonstrated the following facts with reference to the two issues now presented by the railroad[2]—

> 1. The status of the engine radio as a part or appurtenance of the locomotive under the Boiler Inspection Act; and

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2. In the courts below, the petitioner contended that there was insufficient evidence that the engine radio was in fact defective. There was ample evidence to this effect at the trial, and the railroad does not raise the point here.

2. The causal relationship between the defect in the radio and Jackson's tragic accident.

1. Engine radios of the type employed by the Seaboard at the time of the accident are universally used on American railroads as a means of controlling engine movements in switching operations such as those which were under way when the accident occurred. They constitute standard equipment which had been used on *all* railroads for a *number of years* prior to the accident, and since at least 1955 on the Seaboard and its predecessor railroads.

2. Jackson's transmission to "come ahead, Saucer" made with the "Handy Talkie" which he was using was not heard by Saucer in the engine, who was then approximately 1740 feet from Jackson. It was heard, however, by Daniels who was then approximately 1,000 feet from the plaintiff on his "P.T." portable receiver-transmitter.

After Jackson had failed to get any response from Saucer to his radio message, the plaintiff walked a short distance and for some seconds, until he could see his foreman, the Conductor Joseph L. Reynolds, to whom he gave a recognition signal. Jackson then began to walk across tracks to reach an area from which he could give a hand signal with his lantern to the engineer—a movement which would have been entirely unnecessary had the radio signal been received and acted upon. Daniels was standing near Reynolds. Without the knowledge of either Reynolds or Jackson, after having seen Jackson's recognition signal to Reynolds, Daniels transmitted, over his "P.T." set a "come ahead, Saucer" message to the engine. *Although Daniels was further from the engine than*

Jackson, his message was received on the engine. In response, although *Jackson* was supposed to have signalled any movement, and although Saucer had not heard from Jackson and could not see his lantern, the engineer began to push the cut of cars forward (the engine was at the rear of the 28-car cut, with its nose forward). The movement knocked Jackson down and cut off his legs.

The trial judge submitted the case to the jury on both counts of the complaint—negligence, as to which there was the defense of contributory or comparative negligence, and the alleged violation of the Boiler Inspection Act, which imposes liability without the availability of any such defense. After retiring, the jury returned to the courtroom and asked for a rereading of the Boiler Inspection Act instruction. After further deliberations, the jury returned a verdict for the plaintiff in the amount of $325,000. The trial judge denied the railroad's post-trial motions, stating that the verdict was justified under the Boiler Inspection Act charge, which was fully supported by the evidence; the Order stated that, absent such a violation, he would have ordered a new trial or a remittitur to $135,000 in the light of the evidence of the plaintiff's comparative negligence.

In its appeal from the jury verdict and judgment against it to the First District Court of Appeal, the railroad contended, among other things, that as a matter of law

(a) The engine radio did not fall within the provisions of the Boiler Inspection Act; and

(b) The radio defect was not a cause of the accident.

In the decision now sought to be reviewed, the Court of Appeal rejected both contentions, stating at 256 So. 2d 569-570:

> "Evidence adduced most favorable to Jackson's position is as follows: Engine radios have been standard railroad equipment for a number of years and have been used by the defendant Railroad since 1955; Jackson's transmission to the engineer to 'Come ahead' was not received by the engineer on the engine radio receiver; the engineer violated safety rules in moving the train without being in constant communication on the radio or without a signal from Jackson; Jackson's transmission was not heard by the engineer because of some defect in the sensitivity of the receiver installed on the engine; the Railroad took no steps to increase the sensitivity of the receiver in accordance with the manufacturer's recommendations; and had the engineer received Jackson's transmission, Jackson would not have been injured because the sole reason for leaving his place of safety was to walk across the tracks to give a lantern signal which would be visible to the engineer to start the movement.
>
> ". . . In the case of Southern Railway Company v. Bryan the Fifth Circuit Court of Appeals in construing the Boiler Inspection Act stated:
>
> > "'. . . All of the federal safety laws in Chapter 1, Title 45, U.S.C., are in pari materia and must be liberally construed in connection with the federal remedy provided in Chapter 2 of such title to carry out their remedial and humanitarian purposes.'
>
> And in Fritts v. Toledo Terminal R. Co. the federal Supreme Court held that the seat upon which the engineer sat while operating a locomotive was a 'part

and appurtenance' of the engine, the defective condition of which would impose absolute responsibility upon the railroad.

"This record reveals that such radios have been utilized by the railroad industry for a number of years to facilitate the movement of cars in switching and yard operations. We hold that the engine radio here considered was clearly a 'part and appurtenance' as within the meaning of the Boiler Inspection Act.

". . . As to the Railroad's contention that the failure of the radio was not the proximate cause of Jackson's injury, we observe that the evidence is undisputed that had Jackson's transmission been received by the engineer, Jackson would not have left his place of safety."

QUESTIONS PRESENTED

The railroad presents two questions for review by this Court which may be rephrased as follows:

1. Whether an engine radio, which is an integral part of a locomotive, has been in standard use by the railroad industry for many years, and performs a vital function in its operation and use, is a "part" or "appurtenance" of the locomotive within the meaning of the Boiler Inspection Act, 45 U.S.C., § 23.

2. Whether the trial judge and the District Court correctly determined that, on the facts revealed in the record as to the occurrence of the accident in question, there was sufficient evidence of the required causal connection between the Boiler Inspection Act violation and the plaintiff's injury so as to justify the submission of that issue to the jury.

ARGUMENT

The respondent Jackson contends that neither question presented justifies certiorari review by this Court.

A. Status of Engine Radio As Locomotive Appurtenance Subject to Boiler Inspection Act Presents No Basis for Discretionary Review.

It seems perfectly obvious that the District Court holding that the engine radio was a locomotive "appurtenance" under 45 U.S.C., § 23 was so clearly correct, and so clearly in accordance with the terms of the statute and the authorities interpreting it, that the question does not justify full scale review on the merits by this Court.

This Court has often expressed the view that the "safety" provisions of Title 45, U.S.C., § 1, et seq., of which the Boiler Inspection Act is, of course, one, are to be liberally construed to carry out their remedial and humanitarian purposes. E.g., *Urie* v. *Thompson*, 337 U.S. 163 (1948); *Southern R. Co.* v. *Bryan*, 5 Cir. 1967, 375 F. 2d 155, 158, cert. den., 389 U.S. 827 (1967); *Zollinger* v. *Pittsburgh & L.E. R. Co.*, W.D. Pa. 1972, 337 F. Supp. 913. On the issue presented in this case, however, a "liberal" construction of the Boiler Inspection Act is not required to reach the determination that, as the Florida courts have held, the engine radio falls within its purview. The clear and unambiguous terms of the statute itself provide that it applies to "said locomotive, its boiler, tender, *and all parts and appurtenances thereof. . .*"

The decided cases reinforce the conclusion, apparent from the face of the statute itself, that the engine radio was in fact an "appurtenance" of the locomotive in ques-

tion here. As we have noted, it was undisputed in the record that the radio was employed as an integral part of the very work of the engine itself. It was used to direct the movements of the locomotive in the switch operations in which it was engaged. In sum, it is plain that the radio was an "integral part" of the use of the engine—indeed, it is difficult to imagine a part of the locomotive which can more clearly be so characterized. Since this is true, the radio must be deemed a "part" or an "appurtenance" under the Act. The definition of these terms was indicated by the Fifth Circuit in *Southern R. Co.* v. *Bryan*, supra. At 375 F. 2d 158, the court held that a "metal eye" used to replace an engine which had become derailed back on the track was covered by the statute, stating:

> ". . . Getting the locomotive back on the track in the event of derailment was an integral part of its use, and the metal eye designed to assist in that operation came within the broad language 'all parts and appurtenances' of Section 23."

As a matter of fact, virtually *anything* attached or found upon a locomotive falls within the definitions in the Act. Thus, in *Fritts* v. *Toledo Terminal R. Co.*, 6 Cir. 1961, 293 F. 2d 361, the Court held that the seat upon which the engineer sat while operating the locomotive was a "part and appurtenance" of the engine, the defective condition of which would impose absolute responsibility upon the railroad. Accord: *Zollinger* v. *Pittsburgh & L.E. R. Co.*, supra (heavy piece of timber attached to locomotive used for moving railroad car on adjacent track is "part or appurtenance" of engine under Boiler Inspection Act).

The railroad heavily relies upon this Court's decision in *Southern Railway Co.* v. *Lunsford*, 297 U.S. 398 (1936). This reliance is entirely misplaced. There the Court held

that a purely experimental device, in use on some but not all railroads, and which was obviously designed to minimize damage after a derailment had already taken place, did not come within the Act. For many reasons, this holding has no application to the engine radio involved here:

(a) First, the radio is far from an "experimental device" used on only some railroads. Indeed, the defendant itself was anxious to introduce evidence that radios of the type in question were in universal and long standing use in the American railroad industry.

The following appears in the record:

"Q. And have you made a study and actually gone out in the field and bid with other railroads to see the type and kind of equipment that are used in switching and yard operations?

"A. On the other railroads?

"Q. As well as the Seaboard Coast Line.

"A. Yes.

"Q. I ask you then, sir, drawing upon that experience and your knowledge of conditions in the field and referring specifically to the R.M. 3 and the R.M. 2 and the radios that you have described to the jury yesterday and today, handy-talkie, portable talkie and engine radio, whether or not such devices are standard and have been efficiently used in all railroads throughout this country over a number of years?

"A. Yes, sir, they have."

(b) Just as importantly, the radio was not used merely as a "safety device." It was, as we have seen, employed as an integral part of the operations of the locomotive and of the railroad company itself. The

radio was as much a "part" or "appurtenance" of the engine as the wheels or the throttle. As the Court observed as to these issues in the *Zollinger* case, supra, at 337 F. Supp. 914:

> "Employing the push-pole to move a standing car on an adjacent track is an integral part of its use, and this type of pole has been commonly used for this specific operation since at least 1906, the date of the *Howard* case. This last factor distinguishes Southern Ry. Co. v. Lunsford, 297 U.S. 398, 56 S. Ct. 504, 80 L. Ed. 740 [1936], cited by defendant, in which the device in question was new and experimental, designated as a 'gadget' by the court."

Moreover, the fact that the Interstate Commerce Commission has not standardized the type of engine radio required to be employed on railroad engines has no effect upon their coverage under the statute. In *Shields* v. *Atlantic Coast Line R. Co.*, 350 U.S. 318 (1954), this Court squarely held that railroad instrumentalities designated in provisions of the Safety Appliance Act, of which the Boiler Inspection Act is one, fall within the statute whether regulations concerning them are promulgated by the I.C.C. or not. See also, *Southern R. Co.* v. *Bryan*, supra.

Indeed, the language of the *Lunsford* case itself demonstrates that this Court, even in 1936, would necessarily have concurred in the decision below on the "appurtenance" issue. In *Lunsford*, this Court stated that:

> "*Whatever in fact is an integral or essential part of a completed locomotive, and* all parts or attachments definitely prescribed by lawful order of the Interstate Commerce Commission, are within the statute." (Emphasis supplied.)

Since the radio is "an integral or essential part of [the] completed locomotive. . .," the language of the statute could not more clearly apply.[3]

The petitioner suggests that the Act should apply only to "all parts of an engine actually used to make it function *mechanically*. . ." (Petition, p. 11) It is enough to say that this contention finds utterly no support either in the terms of the statute itself or of any case decided under it. The decision below, to the contrary, was in full conformity with both the statute and the applicable cases. There is no basis for certiorari review on this point here.

B. Sufficiency of Evidence As to Causal Connection Presents No Basis for Review.

The second question presented by the railroad likewise presents no basis for review by certiorari. The issue presented concerning the sufficiency of the evidence on the particular facts involved in the particular case to support the jury finding of a requisite causal connection between the railroad's violation of the Act and the plaintiff's injuries, plainly involves no issue of general applicability which would justify review by this Court. In addition, the particular holding is in complete accordance with prior

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3. The petitioner contends that there is a conflict of decisions on this point between the one below and that of the Ohio Supreme Court in *Reed* v. *Pennsylvania R. Co.*, 171 Ohio St. 433, 171 N.E. 2d 718, 721, n. 4, cert. den., 366 U.S. 936 (1961). No such conflict exists. In that case, the decision at 171 N.E. 2d 719, 720, shows that the purportedly defective radiotelephone was not on the *locomotive* in question, which worked properly, but in the receiving set at a railroad station or installation. Apparently for that reason, the Boiler Inspection Act was not at all involved and the plaintiff relied solely upon an alleged violation of the "hand brake" provisions of the Safety Appliance Act, 45 U.S.C., §§ 11, 13. The Court in *Reed* correctly observed that *this* Safety Appliance Act does not require a "properly functioning radiotelephone. . ." The issue involved in this case, the applicability of the *Boiler Inspection Act*, was not decided in any way.

and binding decisions of this Court and is entirely correct on the merits of the issue.

It is plain, first of all, that the railroad is entirely wrong in claiming that principles of "proximate" causation, rather than the *Rogers*[4] "played any part, even the slightest. . ." rule, is applicable in an "absolute liability" case such as this one which arises under the Boiler Inspection Act. This Court has ruled directly to the contrary on several occasions, most recently in *Crane* v. *Cedar Rapids & Iowa City R. Co.*, 395 U.S. 164, 166 (1969), where the Court said:

> "The cause of action created by the Federal Employers' Liability Act of 1908, 35 Stat 65, as amended, 45 USC § 51 et seq., embraces claims of an employee based on violations of the Safety Appliance Act. In such actions, the injured employee is required to prove only the statutory violation and thus is relieved of the burden of proving negligence [citing cases]. *He is not required to prove common-law proximate causation but only that his injury resulted 'in whole or in part' from the railroad's violation of the Act*, 45 USC § 51; Rogers v. Missouri Pac. R. Co., 352 US 500, 1 L Ed 2d 493, 77 S Ct 443 (1957), and the railroad is deprived of the defenses of contributory negligence and assumption of risk, 45 USC §§ 53, 54." (Emphasis supplied.)

Accord: e.g., *Coray* v. *Southern Pacific Co.*, 335 U.S. 520 (1949); *McCalley* v. *Seaboard Coast Line R. Co.*, Fla. 1972, 265 So. 2d 11.[5] The issue then is the simple question of

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4. *Rogers* v. *Missouri P. R. Co.*, 352 U.S. 500 (1957).

5. In the *McCalley* case, the Florida Supreme Court, following this Court's decisions in *Crane* and *Rogers*, held it reversible error to instruct the jury concerning proximate causation in a Safety Appliance Act case. Among the instructions specifically disapproved as having been rendered outmoded and erroneous

whether the railroad's Boiler Inspection Act violation "played any part, even the slightest," in producing Jackson's injury. *Rogers* v. *Missouri P. R. Co.*, supra; see *Bryan* v. *Southern R. Co.*, supra; *DeLima* v. *Trinidad Corp.*, 2 Cir. 1962, 302 F. 2d 585; Annot., 98 A.L.R. 2d 653. It is apparent that the courts below correctly determined that the jury had more than sufficient evidence upon which to conclude that the failure of the engine receiver "played . . . even the slightest" part in Jackson's accident.

As a matter of fact, it is perfectly clear that if the Boiler Inspection Act had not been violated the accident simply would not have occurred. The evidence established that if the engineer, Saucer, had in fact received the message to come ahead, and responded to it either by a return message, a toot of the whistle or by the mere movement of the train itself, so that Jackson could see that the message had been received, Jackson would have had no occasion to walk to the east over the track on which he was injured, so as to give the hand signal to the engineer he thought was required. Indeed, the conductor, Foreman Reynolds, stated that one of the very reasons he gave Jackson the transmitter was to permit signals to be sent and received by radio, and specifically to make it unnecessary for Jackson to walk across the tracks to give a hand signal. When the receiver failed, this purpose was frustrated and the failure

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Footnote continued—

by the *Rogers* case was one which instructed the jury that there is no Safety Appliance Act liability if the violation "is not a proximate cause of the accident which results in . . . injury, but merely creates an incidental condition or situation in which the accident, otherwise caused, results in such injury. . ." This is precisely the statement in the 1926 case of *Davis* v. *Wolfe*, 263 U.S. 239, 243 upon which the petitioner so heavily relies here. There can be no doubt that the Supreme Court of Florida was correct in concluding that this pre-*Rogers* formulation no longer represents the applicable F.E.L.A.-S.A.A.-Boiler Inspection Act rule of causation.

led directly to—even, as the Court of Appeal said, was a "proximate cause" of—Jackson's walking across the tracks and his tragic injury. As Jackson said, in testimony which, itself and alone, establishes the requisite causal connection:

"Q. Now, Mr. Goodwin asked you concerning if you hadn't had thrown the switch, you wouldn't have been struck. Let me ask you, sir, if the switch had been thrown just like you threw it that night and you had gotten a response from the radio, where would you have been when the cars went down the wrong track?

"A. I would have been right where I was standing.

"Q. And where is that?

"A. I would have been standing by the switch stand.

"Q. Over near the woods?

"A. Over near the woods, yes.

"Q. All right, sir. So what was it that made you leave the spot over by the woods and have to go across the tracks?

"A. I had reason to believe—that the cut would—had moved, so I figured I would have to go back to the No. 3 switch, across No. 3 to where I could see my engineer and give him a hand signal.

"Q. And if you had not been required to use the hand signal at that point, would you have ever crossed any tracks?

"A. I wouldn't have had to, no.

"Q. When you gave the recognition signal back to the light you saw, was anything that that light showed you—did that light tell you anything, that somebody else was going to remove your control over the movement?

"A. That light just told me we was ready to come ahead.

"Q. And after you had asked for the engineer to make a move and you looked at the cars and they weren't moving, from that point on, did you—were you aware of anybody giving that engineer any further signals?

"A. No, sir, I was not."

The railroad argues that the failure of the radio message to have been received by the engineer made no "difference" in causing the accident, since, it says, Jackson's call was relayed to the engineer and the train, as a result, started anyway. This argument is entirely fallacious and surely could properly have been rejected by the jury whose function it was to pass on it. The contention is based upon the assumption that the trainman merely passed on Jackson's message to Saucer and that Jackson was injured on the middle lead track only because he did not expect a train on that track and because the train *was* on that track because the plaintiff had thrown the wrong switch. The fact is, however, that Jackson did not *signal Daniels* to signal Saucer to "come ahead;" he had no way of knowing, and in fact did not know, that Daniels had sent any such message or that Saucer had received it. It was not that Jackson did not expect the train on the middle lead track, he expected no movement whatsoever on any track, and this was so purely because of Saucer's failure to receive his message on his defective engine radio.

It is apparent that the causal relationship demonstrated in this record presented nothing less than a question for the jury. *Gallick* v. *Baltimore & Ohio R. Co.*, 372 U.S. 108 (1963). This is true both upon an application of the general principles stated in the cases and upon the basis

of several decisions which pass upon essentially similar situations, in which a Boiler Inspection Act violation has directly exposed the plaintiff to a subsequent danger which injured him. Thus, in *Anderson* v. *Baltimore & Ohio R. Co.*, 2 Cir. 1937, 89 F. 2d 629, 630-631, the plaintiff was struck by a train while standing on a track adjacent to his own locomotive, which he was inspecting after it had been stopped as a result of Boiler Inspection Act violation. Even under the "proximate cause" law which was then applicable, the Second Circuit held that the causal relation between the violation and the injury established a jury question. Similarly, in *Givens* v. *M-K-T R. Co.*, 5 Cir. 1952, 195 F. 2d 225, the plaintiff suffered severe frostbite when he was ordered to the rear of a train which had become stopped because of a locomotive defect during an extremely cold night. The Court held, at 195 F. 2d 230:

> "If the slipping of the tires was caused by defective brakes then under the holding in Coray v. Southern Pacific Co., 335 U.S. 520, 69 S.Ct. 275, 93 L.Ed. 208, there was a violation of the Boiler Inspection Act. If the slipping of the tires and the consequent breakdown of the engine came about from any other cause not the fault of the plaintiff (and there is no contention of any such fault on his part) such breakdown or failure of the engine or of one of its necessary parts or appurtenances to function while in use on the lines of the carrier was itself a violation of the Boiler Inspection Act.
>
> It follows that the plaintiff was entitled to a recovery if such violation was the sole or a contributory proximate cause of plaintiff's injuries. The jury so found in this case in response to special issue No. 1. It is settled that both the Federal Employers' Liability Act

and the Boiler Inspection Act include injuries in the nature of occupational diseases. *The plaintiff was ordered into his hazardous position because of the defendant's violation of the Boiler Inspection Act and clearly, under the evidence, the jury was justified in finding that the breakdown of the engine was a contributory proximate cause of plaintiff's injuries.*" (Emphasis supplied.)

REASONS FOR DENYING PETITION

The petition for writ of certiorari should not be granted because

1. The question below concerning the scope of the Boiler Inspection Act was plainly decided correctly and in entire accordance with the terms of the statute and of the prior and controlling decisions interpreting it.

2. The decision concerning the sufficiency of the evidence concerning causal connection does not involve a question of broad applicability; it determines only the sufficiency of the evidence in a particular factual setting; and determines *that* question, again, entirely in accordance with prior controlling determinations of this Court.

CONCLUSION

It is respectfully submitted that the petition for writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Brief of Respondent was mailed to Petitioner herein by placing same in the United States mail, properly addressed, postage prepaid, on this, the 3rd day of September, 1972, to the attorneys named below:

KENNETH L. RYSKAMP, ESQ.
401 City National Bank Building
Miami, Florida 33130.

.....

ROBERT J. BECKHAM